IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 200 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KOLI BHOPA PREMJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 200 of 1998

MR DD VYAS, for Appellant

MR. PR ABICHANDANI, APP for Respondent - State of Gujarat

CORAM : MR.JUSTICE H.H.MEHTA
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 19/08/2003

C.A.V. JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

1. The appellant has, by filing this Criminal Appeal under Section 374(2) of Criminal Procedure Code, 1973 (for short "Cr.P.C.") challenged the correctness, legality and validity of the judgment, Ex.64 dated 15.01.1998 rendered by the learned Additional Sessions Judge, Surendranagar (who will be referred to hereinafter as "the learned Judge of the trial Court") in Sessions Case No.4 of 1996, by which the appellant has been convicted under Section 235(2) of Cr.P.C. for offences punishable under Section 302 of the Indian Penal Code, 1860 (for shot the "I.P.C.) and under Section 135 of Bombay Police Act, 1951 and is sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.250/-- and in default of payment of fine, to undergo further rigorous imprisonment for three months for an offence punishable under Section 302 of I.P.C. and also to undergo simple imprisonment for one month and to pay a fine of Rs.250/-and in default of payment of fine, to undergo further simple imprisonment for one month for an offence punishable under Section 135 of the Bombay Police Act, 1951.

2. The case of the prosecution as unfolded by the evidence of the prosecution, can be summarized in a nutshell as follows.

2.1 The complainant P.W.1 Nathabhai Ramjibhai, resident of Navagam (Bamanbor) (Taluka Chotila) (District Surendranagar) is the eldest amongst, they five brothers, second is Laxman alias Lakho, with whose wife the appellant had illicit relations since four years before the date of the complaint, third is Vinu, fourth is Mansukh (victim and who has been killed, as alleged by the prosecution) and youngest fifth is Ramesh. The appellant is eldest son of Premji, Sura who is an uncle of the complainant.

2.2 From the evidence, it reveals that any time before 03.09.1995, the appellant and P.W.10 Lila w/o. Laxman Ramji had gone to enjoy the fair of Tarnetar and Than. Laxman Ramji and his brother had seen the appellant with Lila w/o. of Laxman Ramji moving in the fair and, therefore, at about 21.00 hours on 03.09.1995, a quarrel took place in between Laxman Ramji and Mansukh Ramji on one side and appellant on another side. From the evidence it further appears that, as per the case of the appellant, Laxman Ramji husband of Lila inflicted iron pipe - blow on the head of appellant and Mansukh Ramji (since deceased) inflicted iron pipe - blow on the left shoulder of the appellant. As a result of said incident which took place in the "chowk" of village

Navagam (Bamanbor), the appellant lodged his police complaint against Laxman Ramji and Mansukh Ramji, in Chotila Police Station at about 23.00 hours on 03.09.1995 and that complaint came to be registered as C.R.No.I-111/95.

As per the case of the prosecution, because of the aforesaid incident, the appellant was bearing malice against Mansukh (deceased).

2.3 In continuation of the aforesaid incident, at about 11.00 P.M. (at night) on 01.10.1995, the appellant had inflicted more than one knife blows on the person of Mansukh (deceased), who was sleeping in the "Chora" of temple known as "Thakar Mandir". It is the case of the prosecution that at that time, P.W.2 Virabhai Ukabhai and Rama Deva (not examined) were also sleeping in chora of the said temple near to the place where Mansukh (deceased) was sleeping. As per the case of the prosecution, P.W.2 Virabhai actually saw the appellant inflicting knife blows on the body of Mansukh (deceased). He raised cries, as a result of which, P.W.3 Ghoghabhai Ramjibhai, P.W.4 Premjibhai Sardulbhai, a Sarpanch of village Navagam (Bamanbor), and P.W.6 Panchabhai Surabhai, who were present in the "chok" in front of temple rushed to the place from where that cries were raised by P.W.2 Virabhai. It is the case of the prosecution that P.W.3 Ghoghabhai, P.W.4 Premjibhai, and P.W.6 Panchabhai, all the three had seen with their own eyes, the appellant armed with knife running away from the place of the scene of the offence and Mansukh (deceased) was found lying in injured and bleeding condition in the "chora" of temple (a part and parcel of premises of the temple). It is also the case of the prosecution that on hearing the shouts of P.W.2 Virabhai, Dhama Deva, P.W.3 Ghoghabhai, P.W.6 Panchabhai Surabhai had also rushed to the place of incident. Thereafter, P.W.4 Premjibhai, Sarpanch applied bandage by tying a handkerchief at the injured part of Mansukh. Thereafter, Sama Sura (uncle of Mansukh) and brothers Natha and Vinu had also come there. They took away Mansukh (deceased) to their residence and thereafter, they shifted Mansukh (deceased) by taking him in the matador of Rabari Ratna, to Rajkot.

2.4 As per the evidence on the record, injured Mansukh (deceased) was admitted in emergency ward of Civil Hospital at Rajkot at 00.30 hours (mid night) on 02.10.1995. He was examined by P.W.5 Dr.Rathod, who declared him as dead. Doctor, who was on duty in the Hospital informed the Police of Rajkot. The complainant

P.W.1 Nathabhai lodged his complaint in the Hospital at Rajkot and that complaint came to be registered as C.R.No.0/95 in the Pra-Nagar Police Station at Rajkot at 02.30 hours on 02.10.1995. From the evidence, it appears that Police of Pra-Nagar Police Station, Rajkot had informed the police of Chotila Police Station and, therefore, one senior police head constable of Chotila went to Civil Hospital, Rajkot and held an inquest of deceased by drawing a panchnama during the period between 03.00 A.M. and 03.45 A.M. on 02.10.1995. Thereafter, that senior police head constable of Chotila, along with his Yadi, sent deadbody of Mansukh to P.W.5 Dr.Rathod for the purpose of autopsy. P.W.5 Dr.Rathod received that deadbody of Mansukh along with Yadi at about 5.00 A.M. on 02.10.1995. He performed postmortem of deadbody of Mansukh during the period from 7.30 A.M. to 8.45 A.M. on 02.10.1995.

2.5 P.W.13 Kesubha Natvarsinh Zala, who was on duty as P.S.O. of Chotila Police Station received at 7.15 A.M. on 02.10.1995, the complaint, which was registered as C.R.No.0/95 in Pra-Nagar Police Station, Rajkot brought by police man of Rajkot. He, immediately, made an Entry No.6 in Station Diary of Chotila Police Station and registered the said complaint in Chotila Police Station, as C.R.No.I-126/95 at 7.15 A.M. on 02.10.1995.

2.6 P.W.16 Dipakkumar Bhagvandas Shah, who was P.S.I. attached to Halvad Police Station received a vardhi at 3.00 A.M. on 02.10.1995 from the Deputy Superintendent of Police, Dhragandhra, who directed him to carry out the investigation of the case registered in Chotila Police Station. He immediately left Halvad and reached Chotila at about 6.00 A.M. on 02.10.1995. As complaint was registered in Chotila Police Station, he started to carry out the investigation. First, he went to the place of scene of offence where P.W.4 Premjibhai had shown the place of incident to P.W.16 P.S.I. Shah. P.W.16 P.S.I. Shah drew a panchnama of the scene of offence during the period between 7.45 A.M. and 8.30 A.M. on 02.10.1995. Thereafter, he recorded the police statements of witnesses, who were conversant with the facts of the case. Meanwhile, he had received an information that the accused had gone towards Rajkot side and, therefore, he sent two police officers to Rajkot. He also sent a wireless message to Civil Hospital, Rajkot.

2.7 It is the case of the prosecution that before committing an offence of murder the appellant had consumed poisonous drug and, therefore, the father of the appellant had taken him to P.W.11 R.M.P. Dr.Dhanjibhai

Vasharambhai at Bedala where some primary treatment was given to the appellant and, thereafter, Dr.Rathod advised the father of the appellant to take him to some big Hospital. Thereafter, the relatives of appellant took him (Mansukh) to P.W.17 Dr.Jubeda Husenbhai Juneja and got him admitted in the Referral Hospital, Chotila. On the next day i.e. on 03.10.1995 in the morning at 9.00 A.M., the appellant was referred to Civil Hospital at Rajkot. As per the evidence on the record, the appellant was brought in the Civil Hospital at Rajkot at 2.45 P.M. (Noon) on 03.10.1995. P.W.14 Dr.Ashvinkumar Devrajbhai Tank gave medical treatment to the appellant. He discharged the appellant from the Hospital on 05.10.1995.

2.8 P.W.16 P.S.I. Shah, had received an information from Ratna Dhudha Rabari, Driver of Matador that the accused was there in the village Bedala and, therefore, he immediately, went to village Bedala and found that accused was lying in the dispensary of P.W.11 Dr.Rathod. Thereafter, P.W.16 P.S.I. Shah in company of accused and Doctor came to Chotila Hospital and got the accused admitted in the Chotila Hospital. He wrote a Yadi to the Executive Magistrate requesting him to record a dying declaration of the accused. P.W.15 Dhirajlal Ratilal Dave, Executive Magistrate of Chotila received that Yadi and, therefore, he went to the Referral Hospital, Chotila and recorded a dying declaration of the accused during the period between 18.40 hours and 18.58 hours on 02.10.1995.

2.9 On the next day i.e. on 03.10.1995, regular P.S.I. of Chotila P.W.18 Jesangbhai Jethabhai Dhranga resumed his duty, on expiry of his leave, and took over the further investigation from P.W.16 P.S.I. Shah. He wrote a Yadi to Mamlatdar requesting him to prepare a Map of the place of the scene of offence. P.W.18 Mr.Dhranga proceeded to Navagam for the investigation. As he was assaulted, he was admitted in the Hospital. Meanwhile he was transferred to Vadhavan Police Station and, therefore, he handed over the further investigation to P.W.19 P.S.I. Surajibhai Thavraji Kharadi.

2.10 As per the evidence of P.W.19 P.S.I. Kharadi, when he was on duty as P.S.I. of Chotila Police Station on 04.10.1995, he received papers of the investigation from P.W.16 P.S.I. Shah on 05.10.1995. He arrested accused under arrest panchnama at 11.00 A.M. on 06.10.1995. When the accused was in police custody, he had shown his willingness to show the knife which was used in the crime. Thereafter, by following the due procedure and by drawing the panchnama under Section 27

of the Indian Evidence Act, he attached and seized the muddamal knife. Thereafter, he sent incriminating articles and muddamal articles attached and seized by him under the panchnama to the Forensic Science Laboratory, Junagadh (for short "F.S.L."). On receipt of Report from the F.S.L., he filed a charge-sheet on 29.12.1995 against the accused in the Court of the learned J.M.F.C., Chotila. That charge-sheet came to be registered as Criminal Case No.1790 of 1995 for the offences punishable under Section 302 of I.P.C. and also under Section 135 of the Bombay Police Act. As an offence punishable under Section 302 of I.P.C. is exclusively triable the Court of Sessions, the learned J.M.F.C., by passing a committal order under Section 209 of Cr.P.C. on 01.01.1996, committed the said case to the Court of Sessions at Surendranagar. On receipt of the papers, that case came to be registered as Sessions Case No.4 of 1996 in the Court of Sessions at Surendranagr.

3. On the basis of material on record, the learned Judge of the trial Court framed a charge Ex.5 on 22.05.1997. That charge was read over and explained to the accused. On recording his plea, he pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the charge against the accused for which the charge Ex.5 was framed, the prosecution examined the following witnesses :-

P.W.1 Nathabhai Ramjibhai, (complainant) Ex.11
P.W.2 Virabhai Ukabhai Ex.13
P.W.3 Ghoghabhai Ramjibhai Ex.14
P.W.4 Premjibhai Sardulbhai, (sarpanch) Ex.15
P.W.5 Dr.Mansukhlal Jivrajbhai Rathod, Ex.16
(Medical Officer of Rajkot Civil
Hospital)
P.W.6 Panchabhai Surabhai Ex.19
P.W.7 Rameshbhai Manubhai (panch witness Ex.24
No.1 for Mark 10/4)
P.W.8 Ramesh Somabhai (panch witness No.1 Ex.25
for Mark 10/5 & 10/6)
P.W.9 Dhirubhai Mohanbhai (panch witness Ex.26
No.2 for Mark 10/5 & 10/6)
P.W.10 Lilaben Laxmanbhai Ex.27
P.W.11 Dr.Dhanjibhai Vasharambhai Ex.30
(Medical Practitioner in Bedala)
P.W.12 Bhavubha Shivubha (P.S.O. of Pra- Ex.32
Nagar Police Station, Rajkot)
P.W.13 Kesubha Natvarsinh Zala (P.S.O. of Ex.34
Chotila Police Station)

P.W.14 Dr.Ashvinkumar Devrajbhai Tank (Medical Officer of Rajkot Government Hospital) Ex.38

P.W.15 Dhirajlal Ratilal Dave (Mamlatdar and Executive Magistrate, Chotila) Ex.42

P.W.16 Dipakkumar Bhagvandas Shah (P.S.I. of Hadavad Police Station) Ex.47

P.W.17 Dr.Jubeda Husenbhai Juneja (Medical Officer of Referral Hospital at Chotila) Ex.50

P.W.18 Jesangbhai Jethabhai Dhranga (P.S.I. of Chotila Police Station) Ex.52

P.W.19 Surajibhai Thavraji Kharadi (P.S.I. of Chotila Police Station) Ex.54

5. In addition to the aforesaid oral evidence, the prosecution also produced and proved the following documents.

1. Complaint Ex.12
2. P.M. Notes Ex.18
3. Inquest panchnama Ex.20
4. Panchnama of the scene of offence Ex.21
5. Map of the scene of offence Ex.22
6. F.I.R. lodged by accused on 03.09.95 Ex.23
7. Panchnama of the clothes of the deceased Ex.33
8. Medical certificate issued by Dr.Tank Ex.39
9. Carbon copy of dying declaration Ex.46
10. Bunch of case papers produced by Dr.Juneja Ex.51
11. Discovery panchnama of the knife drawn u/s.27 of Indian Evidence Act Ex.56
12. Report of F.S.L. Ex.59
13. Report of the Serologist Ex.60

in support of their case against the accused.

6. After recording the evidence of the prosecution witnesses was over, the incriminating circumstances appearing against the accused were brought to the notice of and explained to the accused and whatever replies he gave to the questions put under Section 313 of Cr.P.C., were recorded below his plea. The accused has, practically, denied the case of the prosecution and his defence is of a general denial. Still however, he has admitted certain facts. In reply to question No.5, he has replied that he had illicit relations with Lila w/o. Laxman Ramji and that he was beaten by Mansukh (deceased) for which a case was tried. In reply to question No.57, he has replied that Lila w/o. Laxman Ramji was not

abandoning him and she was giving him threats that she would commit suicide, if she would not be taken away by him and, therefore, he consumed poisonous drug. He has also admitted that he had illicit relations with her since last four years. He has filed his written reply Ex.62. It is the defence pleaded in written reply Ex.62, that witness P.W.1 Nathabhai is a relative of the deceased Mansukh and that he (accused) had illicit relations with Lila, who is a wife of elder brother of the deceased Mansukh. It is further the defence of the accused that he wanted to abandon Lila, but she was not willing to leave him, as a result of which the whole village was against him and was keeping an inimical relation with him. It is also the defence of the accused that on the basis of the doubt and in collusion with each other, the witnesses have falsely implicated him in the case and that he has not committed a murder of Mansukh. He has denied the evidence of witnesses, witness wise. In para-13 of his written reply, Ex.62, the accused has stated that P.W.15 Dhirajlal Ratilal Dave (Executive Magistrate) has not recorded his any dying declaration and that he was not conscious in Chotila Hospital and that he has not signed any dying declaration. Alleged original dying declaration is lost and, therefore, Dhirajlal (Executive Magistrate) has produced carbon copy which has been concocted subsequently. In last para of the written reply Ex.62, the accused has advanced his case, that because of his illicit relations with Lila, the whole village was against him and was keeping inimical relation with him and that he has been falsely implicated in the case. He has further stated that on the date of the incident, he was present in his own house. Lila was not leaving him and she wanted to keep the relations continued with him, forcibly and, therefore, he felt that it was not good for him to survive and, therefore, at 8.00 P.M. he consumed a poisonous drug and, thereafter, he became complete unconscious. He has further stated that he became conscious on date 3rd or 4th and during that interregnum, he has been falsely implicated and roped in the case and further that he is an innocent.

7. Thereafter, after hearing the arguments of the learned advocates for both the parties and after making an examination, scrutiny and appreciation of the evidence on record, the learned Judge of the trial Court has come to the conclusions that the the prosecution proved beyond all reasonable doubt, that the accused committed a murder of Mansukh and that the accused has committed a breach of notification of the District Magistrate. On the basis of the said conclusions, he has given a clear finding that

the accused has committed the offences punishable under Section 302 of I.P.C. and Section 135 of the Bombay Police Act, 1951. On the basis of this finding, the learned Judge of the trial Court, by rendering his detailed judgment Ex.64 dated 15.01.1998 in aforesaid Sessions Case No.4 of 1996, convicted the accused under Section 235(2) of Cr.P.C. for the offences punishable under Section 302 of I.P.C. and Section 135 of Bombay Police Act, 1951 and inflicted different sentences as stated in para-1 hereinabove.

8. Being aggrieved against and dissatisfied with the said judgment of conviction and sentence, the accused has, by preferring this present Criminal Appeal, challenged the said judgment, Ex.64.

9. We have heard Mr.D.D.Vyas, learned senior advocate for the appellant - accused and Mr.P.R.Abichandani, learned APP for the respondent - State of Gujarat, in detail, at length. Mr.Vyas and Mr.Abichandani have taken us through the entire evidence on record, oral as well as documentary. Mr.Abichandani has also taken us through the impugned judgment.

10. Mr.D.D.Vyas, learned senior advocate for the accused has assailed the impugned judgment on the following counts.

[A] The learned Judge of the trial Court has not appreciated the evidence correctly in its proper perspective.

[B] The evidence of alleged eye witness P.W.2 Virabhai is not trustworthy and reliable as there are so many infirmities and major contradictions in his evidence. His presence at the place of incident is very much doubtful and further his evidence is not probable because at the alleged time of the incident, there was no electricity light and, therefore, he had no opportunity to see the assailant in the darkness. His conduct is most unnatural and, therefore, the learned Judge of the trial Court has grossly erred in placing reliance on the evidence of P.W.2 Virabhai. He has argued that the evidence of P.W.2 Virabhai should be discarded by this Court for coming to its own conclusion.

[C] For three other witnesses, P.W.3 Ghoghabhai P.W.4 Premjibhai, and P.W.6 Panchabhai, who had, as alleged by the prosecution, seen the accused armed with the knife running away from that place, he has argued that their evidence is full of major contradictions and in the

absence of electricity light, they could not have seen anything and, therefore, their evidence being doubtful, should not be taken into consideration.

[D] The aforesaid four witnesses as well as complainant are closely related to the deceased Mansukh and, therefore, they are highly interested witnesses and, therefore, their evidence should be discarded at the time of appreciation of the evidence on record.

[E] He has argued that as per the evidence of P.W.2 Virabhai, before the incident took place, three persons were sleeping on the Chora of temple and amongst them one was Rama Deva, second was deceased Mansukh and third was he himself. Mr.Vyas has argued that the prosecution has purposely not examined Rama Deva whose house is shown towards the West leaving the road leading to Sarvaiya Fali, in the Map Ex.22. He has further argued that Rama Deva was an eye witness to the incident, as per the case of the prosecution and, therefore, he was most material important witness of the prosecution and as he has been dropped, an adverse inference should be drawn against the prosecution that had he deposed before the Court, perhaps quite contrary and different facts might have been deposed to by Rama Deva.

[F] He has argued that the prosecution has put much stress on alleged dying declaration Ex.46 recorded by P.W.15 Dhirajlal (Executive Magistrate). He has argued that fortunately the accused has survived, after consuming poisonous drug and, therefore, in no case Ex.46 can be said to be a dying declaration relevant under Section 32 of the Indian Evidence Act. He has also argued that the said statement Ex.46, cannot be said to be a statement under Section 164 of Cr.P.C. because right from the dispensary of P.W.11 Dr.Dhanjibhai of Bedala to Chotila Hospital, the accused was under constant police surveillance and, therefore, the said statement Ex.46 is hit by Section 25 of the Indian Evidence Act.

[G] He has argued that it is the case of the prosecution that the said statement Ex.46 as alleged by the prosecution was recorded during the period between 18.40 hours and 18.58 hours on 02.10.1995, when the accused was under medical treatment in Chotila Hospital, but as per the evidence of P.W.17 Dr.Juneja, the accused was admitted in the Referral Hospital of Chotila at 20.00 hours and, therefore, ex-facie said statement Ex.46 appears to be false and concocted, because he was admitted in Chotila Hospital at 20.00 hours. He has

argued that in view of this evidence on record for Ex.46, said statement is inadmissible in evidence because original primary evidence is missing and the prosecution wants to place reliance on carbon copy which is a secondary evidence.

[H] Mr.Vyas has argued that it is in evidence on record that before 03.09.1995, this accused had lodged one complaint being C.R.No.I-111/95 against Laxman Ramji and Mansukh Ramji in Chotila Police Station and that complaint is on record Ex.23. This complaint Ex.23 has been exhibited with the consent of defence lawyer. The learned defence lawyer put his consenting endorsement below list Ex.10 for the documents Mark 10/1 and 10/15 and wrote that he has no objection if said two documents are exhibited and be read as evidence and, therefore, it can be said that this Ex.23 is admitted document for the accused. Mr.Vyas has argued that as per this complaint Ex.23 any time before 03.09.1995, the accused and Lila w/o. Laxman Ramji had gone to enjoy the fair of Tarnetar and Than and they both were seen by Laxman and his brother and, therefore, by bearing malice the accused was beaten in Chowk of village Navagam (Bamanbor) at about 21.00 hours on 03.09.1995. As per this complaint Ex.23, Laxman Ramji and Mansukh Ramji both had abused present accused and in the course of verbal altercation, both Laxman Ramji and Mansukh Ramji got excited and inflicted iron pipe blows on person of Mansukh and Laxman inflicted iron pipe blow on the head of the accused and Mansukh inflicted iron pipe blow on left shoulder of the accused and in that incident, the present accused was seriously injured for which he lodged the said complaint for offences punishable under Sections 324, 323, 504, 114 of I.P.C. and also Section 135 of Bombay Police Act. Mr.Vyas has argued that because of this complaint Ex.23, which was lodged by the present accused, he has been falsely implicated in the case. He has argued that admittedly, there were inimical relations in between Laxman and Mansukh on one side and accused on the other side, because of illicit relations of accused with Lila w/o. Laxman Ramji. Mr.Vyas has argued that because of this inimical relation, the accused has been falsely implicated in the case. He has argued that the learned Judge of the trial Court has not considered this aspect of inimical relations of complainant's side with accused.

[I] The prosecution has placed reliance on the alleged discovery panchnama Ex.56 drawn under Section 27 of the Indian Evidence Act. Mr.Vyas has argued that panch witnesses have not supported the case for this panchnama Ex.56 and P.W.19 P.S.I. Kharadi has not deposed

to prove the necessary ingredients of Section 27 of Indian Evidence Act and, therefore, this panchnama Ex.56 should not have been relied on by the learned Judge of the trial Court.

[J] Mr.Vyas has argued that till 06.10.1995, the accused was not arrested, though he was very much present before the police and, therefore, there is a reason to believe that till 06.10.1995, there was no evidence evidence against the accused and subsequently, he has been implicated falsely in the case.

[K] Lastly, Mr.Vyas has argued that considering the entire set of facts and circumstances, the evidence on record is not sufficient to prove the case against the accused and, therefore, the learned Judge of the trial Court has grossly erred in holding the accused guilty for an offence of murder of Mansukh. He has argued that considering the submissions made by him, the accused - appellant be acquitted by allowing his appeal.

11. Mr.P.R.Abichandani, learned APP for the respondent - State of Gujarat has supported the judgment of conviction and sentence, through out. He has argued that the learned Judge of the trial Court has correctly appreciated the evidence in its proper perspective. He has argued that witnesses P.W.2 Virabhai, P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai are natural and independent witnesses. They are real eye witnesses to the incident and their evidence, as held by the learned Judge of the trial Court, is reliable and trustworthy, and their evidence inspires confidence. He has further argued that the learned Judge of the trial Court has rightly placed reliance on the evidence of these four important witnesses. Their evidence cannot be brushed aside lightly. He has argued that the evidence of these four important witnesses stands corroborated by the medical evidence as well as the discovery panchnama Ex.56. He has further argued that muddamal knife, which was discovered at the instance of the accused was sent to F.S.L. and as per the report of Serologist Ex.16, Item No.12, which was a blood sample of the deceased collected by P.W.16 Dr.Rathod was human blood of "A" group and, therefore, blood found on the knife and blood of the deceased matched with each other. He has argued that the evidence of all the four important witnesses gets corroboration from the statement Ex.46 recorded by P.W.15 Dhirajlal (Executive Magistrate). He has made it clear that Ex.46 is neither a dying declaration under Section 32 of the Indian Evidence Act nor a statement under Section 164 of Cr.P.C. He has argued that this statement

Ex.46 is an extra judicial confession of the accused made to P.W.15 Dhirajlal, who is an independent public officer. He is an independent witness having no interest, either in the case of the prosecution or to grind axe against the accused. He has argued that the said statement Ex.46 is rightly admitted in the evidence and the learned Judge of the trial Court has rightly placed reliance on this statement Ex.46. He has argued that if, we read written reply Ex.62 filed by the accused under Section 313 of Cr.P.C. together with the said statement Ex.46, we find that the prosecution has proved the case against the accused beyond reasonable doubt. He has further argued that the accused has admitted that he had illicit relations with Lila w/o. Laxman Ramji and it was not liked by the family members of Lila and the residents of village, but there is no material on record to indicate that he has been implicated falsely. A suggestion in the case, cannot take place of proof and, therefore, the contention taken by Mr.Vyas requires to be rejected. He has further argued that I.O. had good reasons not to arrest the accused till 06.10.1995, as the accused was under medical treatment till 05.10.1995. Merely because accused was arrested late after five days, it will not destroy the case of the prosecution. He has argued that the learned Judge of the trial Court has carefully appreciated the evidence on record and by assigning cogent and convincing reasons, he has come to a conclusion that the accused is guilty for an offence of the murder of Mansukh. Lastly, he has argued that in view of his submissions, the appeal lacks merit and, therefore, it be dismissed, by confirming the judgment in question.

12. We have dispassionately considered the submissions made by the learned advocates for both the parties. We have carefully and minutely examined the evidence on record. We have made thorough examination scrutiny and re-appreciation of the evidence on record to come to our own conclusions to decide this appeal. We have perused the impugned judgment, which is challenged in this appeal. We have also gone through the record and proceedings of the case, which have been called for from the trial Court.

13. During the course of arguments, Mr.D.D.Vyas, learned advocate for the appellant/accused has fairly conceded that there is no serious dispute with regard to factum that Mansukh died homicidal death. Mr.Vyas has argued that the learned Judge of the trial Court has not separately decided a point with regard to nature of death of Mansukh. Mr.Vyas has also argued that in paras 18 and

19 of the judgment Ex.64, the learned Judge of the trial Court has discussed the medical evidence, but he has not come to a specific conclusion that the Mansukh died homicidal death.

13.1 In view of this, we have examined the evidence on record, the prosecution has produced the inquest panchnama. Defence lawyer has admitted the said inquest panchnama, as per his endorsement made below Ex.10 and, therefore, Mark 10/10 has been admitted in the evidence and it has been exhibited as Ex.20. There was one wound near umbilicus and another wound on the left side of the chest of Mansukh. The senior police head constable of Chotila Police Station, who had gone to Rajkot Civil Hospital, had drawn this inquest panchnama Ex.20 and after drawing that inquest panchnama Ex.20, he wrote a Yadi Ex.17 and, thereafter, he sent, deadbody of Mansukh along with Yadi Ex.17 a copy of inquest panchnama Ex.20 and prescribed death form to Medical Officer, Civil Hospital, Rajkot for autopsy.

13.2 The prosecution has examined P.W.5 Dr.Rathod (Ex.16), who performed postmortem on deadbody of Mansukh which was sent along with a Yadi Ex.17. He has deposed that on 02.10.1995, he was performing his duty as Medical Officer in Civil Hospital, Rajkot and at about 00.30 hours (night), one Mansukh Ramjibhai Koli was brought in the emergency ward of the said Hospital. On examination, he found that it was a deadbody of Mansukh. Thereafter, doctor on duty informed the police. He has further deposed that in the morning at 5.00 A.M., he received that deadbody of Mansukh along with a Yadi Ex.17 for postmortem. He started performing postmortem at 7.00 A.M. and completed it at 8.45 A.M. As per his evidence, he found the following external injuries, which he noted down in para-17 of P.M. Notes Ex.18.

[1] An incised stab wound in 8th intercostal space medial to left mid clavicula line 1" x 1/2" x cavity deep oblique.

[2] An incised stab wound in 6th intercostal space in left mid axillary line 1" x 1/2" x cavity deep transeversus.

[3] An incised stab wound on back on left side on lower 1/3" 3/4" x 1/4" x cavity deep oblique.

[4] An incised would on right middle finger and palm 1 1/2" x 1/2" x skin deep.

He has further deposed that he found following internal injuries.

[1] Pleura : An incised stab wound on left middle lob pleura 2" x 1/2".

[2] Left Lung : An incised wound on left middle lob on anterior surface 2" x 1/2" x 2".

[3] Pericardium : On posterior surface an incised an incised wound 1/2" x 1/2".

[4] Heart : An incised wound on posterior wall of left ventricular 1/2" x 1/2" x cavity deep.

He has further deposed that the aforesaid injuries were antemortem and the said injuries were sufficient to cause the death of Mansukh. He has given his opinion in para-23 of P.M.Notes, Ex.18, as to the cause of death, as follows.

"Final cause of death is shock due to extensive haemorrhage and due to injury of vital organs."

This witness was shown muddamal article No.11 a knife and on seeing that knife, he has opined that the aforesaid injuries could be possible by this knife. On giving cumulative effect to the evidence of an inquest panchnama Ex.20 and the P.M. Notes Ex.18 read with oral testimony of P.W.5 Dr.Rathod, Ex.16, it is crystal clear that Mansukh died homicidal death.

14. Now this takes us to decide, as to who was the author of injuries sustained by Mansukh which were noticed by Dr.Rathod. It is the case of the prosecution that the accused inflicted blows of knife on the body of Mansukh, as a result of which Mansukh sustained aforesaid injuries and as a direct result of that injuries, Mansukh died. To prove this case, the prosecution has placed reliance on the following evidence.

[1] On the point of motive :- the prosecution has relied upon the evidence of P.W.10 - Lila w/o. Laxman Ramji together with F.I.R. Ex.23 lodged by the accused and his written reply Ex.62 filed in his further statement under Section 313 of Cr.P.C.

[2] Eye witness to the incident :- P.W.2 Virabhai,

P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai.

[3] Discovery panchnama Ex.56 :- Under which a muddamal article No.11 a knife which was concealed by the accused and traced out by him in presence of panch witnesses.

[4] Report of F.S.L., Ex.59.

[5] Statement Ex.46 recorded by P.W.15 Mr.Dave, [Executive Magistrate].

15. First we would like to consider the evidence with regard to the mens-rea of the accused. From the very beginning, it is the case of the prosecution that since four years before the date of the incident, the accused was having illicit relations with P.W.10 Lila, who is wife of Laxman Ramji, elder brother of the deceased Mansukh. Certainly such relations are not socially acceptable by the near relatives of the husband of the lady with whom such affairs are going on and, therefore, because of this type of illicit relations of the accused with Lila before 03.09.1995, the quarrels in between accused on one side and brother of Laxman on otherside were being taken place. It is the case of the prosecution that before 03.09.1995, the accused and Lila, both had gone to enjoy fair of Tarnetar and Than and they both were seen by Laxman and Mansukh. The prosecution has produced one copy of F.I.R. being C.R.No.I-111/95 of Chotila Police Station, at Ex.23. As it was admitted by the defence lawyer for being admitted in the evidence, it has been exhibited and, therefore, it can be said that there is no dispute with regard to contents of Ex.23. As per this F.I.R. lodged by the present accused against Laxman (husband of Lila) and deceased Mansukh, at about 9.00 P.M. on 03.09.1995, quarrel took place in between accused on one side and Laxman and deceased Mansukh on otherside in the chowk of village Navagam (Bamanbor) and in that quarrel, both the accused of that case i.e. Laxman and Mansukh, were armed with iron pipe. From F.I.R. Ex.23, it also appears that Laxman (husband of Lila) had reprimanded the present accused saying, as to why he was not abandoning Lila and in that incident, verbal altercation took place in between both the parties and during the course of the said verbal altercation Laxman got excited and he inflicted an iron pipe blow on the head of the present accused and Mansukh (deceased) also inflicted iron pipe blow on the left shoulder of the present accused, as a result of which the present accused was seriously injured and, therefore, he lodged the

complaint Ex.23 against the said two brothers at 23.00 hours on the same day in Chotila Police Station. Thus there is no dispute from the side of accused for illicit relations of the accused with Lila. Accused himself has admitted in para-1 of his written reply Ex.62 that since long, he had illicit relations with Lila w/o. Laxman, the brother of deceased Mansukh. He has also stated in the last para of written reply Ex.62 that because of his illicit relation with Lila, the whole village was against him. The prosecution has also relied on P.W.10 Lilaben Laxmanbhai. She has admitted in para-1 of her evidence that this incident took place because of her illicit relation with Bhopa i.e. present accused. She has also admitted in her evidence that as she had illicit relation with Bhopa, she was driven out from the house of her in-laws. She has further admitted that such type of illicit relation is going on with her since one and half year. In view of the above reasons, the quarrel took place on 03.09.1995 and in that incident, the present accused was beaten and injured by the husband of Lila and deceased Mansukh, a younger brother of the husband of Lila. It is the case of the prosecution that because of this incident which took place on 03.09.1995, the present accused was bearing malice against the deceased Mansukh and, therefore, to take a revenge, the present accused attacked and assaulted on the deceased Mansukh by inflicting blows with a knife. So the prosecution has come with a specific case that, because of inimical relation and particularly, by keeping in mind the aforesaid incident which took place on 03.09.1995, the accused made an assault on Mansukh.

16. Mr.Vyas has argued that the fact of inimical relations is a double edged weapon. It can be inferred that because of this inimical relation, the brother of deceased Mansukh has falsely implicated the present accused. He has further argued that when there are two views possible, one in favour of accused and another against the accused, then the view which is in favour of the accused, should be accepted and in that case, benefit of doubt should be given to the accused.

17. We have come across a case of ANIL RAI Vs. STATE OF BIHAR, reported in AIR 2001 S.C. 3173, wherein it has been held as follows :-

> "Enmity is a double edged weapon which can be a motive for the crime as also the ground for false implication of the accused persons. In case of inimical witnesses, the Courts are required to scrutinize their testimony with anxious care to

> find out whether their testimony inspires confidence to be acceptable notwithstanding the existence of enmity. Where enmity is proved to be the motive for the commission of the crime, the accused cannot urge that despite proof of the motive of the crime, the witnesses proved to be inimical should not be relied upon. Bitter animosity held to be a double edged weapon may be instrumental for false involvement or for the witnesses inferring and strongly believing that the crime must have been committed by the accused. Such possibility has to be kept in mind while evaluating the prosecution witnesses regarding the involvement of the accused in the commission of the crime. Testimony of eye witnesses, which is otherwise convincing and consistent, cannot be discarded simply on the ground that the deceased were related to the eye-witnesses or previously there were some disputes between the accused and the deceased or the witnesses. The existence of animosity between the accused and the witnesses may, in some cases, give rise to the possibility of the witnesses exaggerating the role of some of the accused of trying to rope in more persons as accused persons for the commission of the crime. Such a possibility is required to be ascertained on the facts of each case. However, the mere existence of enmity particularly when it is alleged as a motive for the commission of the crime cannot be made a basis to discard or reject the testimony of the eye-witnesses, the deposition of whom is otherwise consistent and convincing."

18. Applying the aforesaid principles of law with regard to appreciation of the evidence of the witnesses, who have animosity with the accused, to the facts of this case, we find that the prosecution has come with a specific case of motive and the facts stated for such motive are not in dispute from the side of the accused and, therefore, the prosecution has ably proved their case with regard to motive in the case.

19. Now this takes us to decide as to who was author of the injuries sustained by the deceased Mansukh. Here in this case, there is a direct evidence of P.W.2 Virabhai Ukabhai, Ex.13, who is an eye witness to the incident. He has deposed in his evidence that a program of of regional folk - dance (Garbi) during "Navaratri"

holidays was being held near the Thakar Temple and on the night of the fateful incident, he, Rama Deva and Mansukh Ramji were sleeping in the Thakar Temple. He has further deposed that when he was sleeping, Bhopa Premji came and inflicted knife blows to Mansukh and that foot of accused touched with a loose ladder, which was put in horizontal condition, as a result of which ladder fell down and he wake up and shouted "run run knife blow is being inflicted". He has further deposed that after waking up, he saw that the accused was inflicting knife blows and that Bhopa Premji had inflicted knife blows to Mansukh. He has further deposed that as Bhopa Premji is a boy resident of their village, he was knowing him. He identified the accused before the trial Court. He has further deposed that after he raised shouts, Sarpanch, Premji Sardul, Dhama Deva, Ghogha Rama, Pancha Sura immediately rushed to the place. He has further deposed that as he shouted, Bhopa Premji fled from the place. He has further deposed that after persons gathered there, Premji Sardul had tied a bandage to Mansukh and, thereafter, Sama Sura, who is uncle of Mansukh and his brothers Natho and Vinu came there. He has further deposed that thereafter, Mansukh was taken first to the residence and, thereafter, he was, by taking him in a matador of Rabari Ratna, shifted to Rajkot Hospital. He has further deposed that later on, he came to know that Mansukh expired. He has further deposed that he did not know as to why Mansukh was beaten and that he dictated the statement to the police.

In the cross-examination, he has deposed that he did not go with the persons, who took Mansukh to the residence. He has further testified that he did not tell them to lodge a complaint to the effect that the accused had injured Mansukh and that he did not go to some factory for making a phone to police for lodging the complaint. He has further deposed that he only shouted "run run knife blow is being inflicted". He has further deposed that after Mansukh was taken to the Hospital, none of them had gone to Police Out Post for lodging the complaint. He has further deposed that he was not aware about the illicit relations of Bhopa with Lila w/o. Laxman Ramji. He was confronted with his police statement and he has stated that it was not true that he stated before the police to the effect that Bhopa Premji had illicit relation with Lila, who is a wife of brother of Mankush and, therefore, quarrels were being taken place and that recently one month before, Mansukh had beaten Bhopa in connection with this relation and for that a complaint had been lodged in Chotila Police Station. He has further deposed that since one year, he

has difficulty of hard of hearing, but before that he was properly hearing. He has further deposed that by shouting, he awoke Rama Deva and at that time, Bhopa fled and that he had no talk with regard to incident with Rama Deva. He has further deposed that on hearing the noise of fall of loose ladder, he woke up and saw the occurrence of the incident. He has further deposed that he had shown the place of incident to the police. He has further deposed that Mansukh was sleeping at a distance of 15 to 20 feet from him. The loose ladder was put touching the eastern side wall and that ladder fell horizontally just adjacent to that wall. He has further deposed that it had not so happened that there was a scuffle in between Mansukh and accused and that he was injured, when he was sleeping.

20. P.W.3 Ghoghabhai Ramjibhai, Ex.14 has deposed that a program of regional folk dance (Garbi) during "Navaratri" days was being held at Thakar Temple. He has further deposed that Mansukh died before last more than two years and on that day, it was the first day of the month and that they were the days of Navaratri. He has further deposed that he was present in the chowk of Mataji. With regard to the incident, he has further deposed that when they were present in the chowk, they heard the noise and, therefore, their attention was drawn to that side from where the noise came and they saw that Bhopa Premji, by taking with him a knife, getting down the steps of the temple and Bhopa might have gone towards the eastern side. He has further deposed that they went inside the temple, and saw that Mansukh was lying in bleeding condition and there was injury like wound on his abdomen. He has further deposed that Premji had tied a bandage on the wound. He has further deposed that he knows Bhopa, who was going away with the knife. He identified the accused before the trial Court. He has also deposed that he saw him (accused) getting down the steps of temple and, thereafter, the uncle of Mansukh and others took him to Rajkot where he died. He has further deposed that the police came to their village in the morning and police had interrogated him. He has further deposed that he stated before the police about the facts which had happened.

In the cross-examination, he has deposed that after Mansukh was taken away from the place, he went to his house and they slept. On the next day, after 6.00 A.M., a peon of village panchayat came to call him. He has further deposed that he came to know that Mansukh expired, when his relatives brought his deadbody to the village at about 12.00 noon. He has further deposed that

at that time, he was present in his field and when he returned to village at about 3.00 P.M. to 4.00 P.M., he came to know that Mansukh had expired. He has further deposed that police had recorded his statement before he came to know about the death of Mansukh and that he had no knowledge about the death of Mansukh, when the police had recorded the statement. He has further deposed that the police had recorded his statement at 7.30 A.M. in the morning. He has further deposed that the house of the accused is at a distance of 15 to 20 feet from the temple. He testified before the trial Court that on that day at about 8.30 P.M. or 9.00 P.M., there was failure of electricity supply and, therefore, Premjibhai had gone to connect "dyio" (It seems that he wants to convey D.P. a place where fuse-wire of electricity is being connected and by connecting fuse-wire, electricity supply is restored). He has further deposed that Premjibhai returned, after connecting fuse at D.P. at about 10.30 P.M. to 10.45 P.M. He has further deposed that on his return, they went to chowk and, thereafter, they heard a noise of shout. This witness has denied a suggestion that when there was a noise of shout, there was darkness at the place. He has further deposed that Limbabhai and he, chased the accused for about five to ten feet but they did not run behind him upto his house. He has further deposed that other persons were shouting to catch hold of him. Possibly a question was put to him, as to why they did not run behind assailant to catch hold of him and in reply to that question, he replied that who would go to catch hold of him. He has further deposed that on the next day in the after noon, his statement was recorded. He has further deposed that about 7-8 persons were present there at the place of regional folk dance (Garbi) and further that the program of regional folk dance (Garbi) was to commence after electricity supply was restored. He has further deposed that the program of regional folk dance (Garbi) did not commence as there was no electricity supply. A case has been suggested that he was giving evidence falsely and he has denied that suggestion.

21. P.W.4 Premjibhai Sardulbhai, Ex.15 has deposed that in the year 1995, he was a Sarpanch of the village and they were the days of Navaratri and that murder was committed in the chora of Thakar Temple at about 11.00 P.M. (night). He has further testified that at that time, they were present in the chowk of "Garbi Mandal". They heard the shout of Vira Uka "run run, here person is injured". He has further deposed that on hearing this shout, they rushed to the place and he saw a boy - Bhopa of their village, who was getting down from the steps of

temple by taking with him a knife. He has categorically deposed that Bhopa met them, but thereafter, he ran away from the place. He has further deposed that after entering into the temple, they saw Mansukh lying in bleeding condition and that there were wounds, one at umbilicus and another wound on the left side of the chest. He has further deposed that thereafter, Sama Sura, uncle of Mansukh and two elder brothers of Mansukh and his mother were called. Thereafter, his relatives came and took Mansukh in hammock of quilt. He has further deposed that Dhama Sura was sent to make an arrangement for vehicle and, thereafter, they, by taking Mansukh in Matador of Ratna Guga, went to Civil Hospital at Rajkot. He has further deposed that on examination, doctor said that he was dead and, thereafter, the deadbody of Mansukh was taken to the postmortem room. He has further deposed that his statement was recorded by the police in the morning in their village. He has clarified that his statement was recorded by P.S.I., Dhrangadhra and he dictated his statement, as per the incident seen by him. He identified the accused before the trial Court. He has further deposed that Bhopa had lodged a complaint for a verbal altercation, which took place in between Bhopa and Mansukh. He has further deposed that he had heard the talk with regard to illicit relation of Bhopa with the wife of elder brother of Mansukh.

In the cross-examination, he has admitted that he in his capacity as Sarpanch used to inform the police whenever the offence is committed. He has admitted that there are some factories in Bamanbor just outside the gate of their village and there is facility of telephones in that factories. He has further deposed that there is one police chowki, opposite to bridge, after leaving Bamanbor. He has admitted that none of them had informed the police in the police chowki. He has further deposed that he left village for Rajkot, half an hour after the incident. He has further deposed that the father of Mansukh has three brothers and Mansukh has four brothers who are major persons. He has further deposed that Ranchhodbhai, uncle of Mansukh has three sons and his uncle Samjibhai has also three sons and all are major persons. He has deposed in para-4 of his deposition that 10 to 12 persons were present there at the Garbi. He volunteered and stated to the Court that it was raining. He instructed no one to go to the police station. He has further deposed that on the next day in the morning, he had shown the place of incident to the police and that panchnama was drawn as per his dictation. He has further deposed that during the night hours, P.S.I. of Chotila

Police Station had come for investigation of the case and when that P.S.I. drew a panchnama of deadbody, he was present there. He has further deposed that at that time, he was having intention to say about the incident to the police and he informed police Jamadar that he had seen the incident. He has further deposed that his statement was not recorded in Rajkot Civil Hospital. He has further deposed that when a panchnama of deadbody was drawn, his signature was taken on that panchnama. He has further deposed that he left Rajkot in the morning at 4.00 A.M. and reached to his village at 5.00 P.M. to 5.30 P.M. He has further deposed that as police Jamadar of Chotila Police Station had come to Rajkot, he did not make phone to Chotila Police Station. He has clarified that police Jamadar of Chotila Police Station had not taken any complaint. He has also deposed that deadbody was brought to the village at about 10.00 P.M. He has further deposed that when he had shown the place of the incident to the police, he had contacted the residents of the village. He has further deposed that he had called Vira Uka. and that he did not know as to whether the statement of Vira Uka was recorded or not. He has made it clear that in his presence, the statements of Dhama Deva, Pancha Sura and Ghogha Rama were recorded in the evening. He has further deposed that the statement of Rama Deva was recorded in the morning at 9.00 A.M. and that his statement was also recorded in the morning at 9.00 A.M. He has further deposed that he and Mansukh are caste fellows. He denied that because of close relations with Mansukh, he was giving false evidence.

22. P.W.6 Panchabhai Surabhai, Ex.19 has deposed in his evidence that a program of Garbi was arranged in chora of village. He has further deposed that Mansukh died in the temple known as Thakar Temple in their village. He has further deposed that the incident took place before about two years and at that time, there was festival of Navaratri and the incident took place at 11.00 P.M. He has further deposed that at that time, he was present at Garbi of Thakar Temple, and Virabhai shouted "run run Mansukh is injured" and, therefore, they went near Thakar Temple and saw that Bhopa, by taking with him a knife was getting down from the steps of that temple. He has further deposed that when they came inside the temple, they saw Mansukh lying in a bleeding condition and he had sustained injuries on the left side of the abdomen. He has further deposed that Naran Bhavan and Premji Sardul had tied bandage of the handkerchief. He has further deposed that thereafter, uncle and brothers of Mansukh came there and they took Mansukh to their residence and, thereafter, they took Mansukh in

Matador to Rajkot. He has further deposed that in the morning at about 8.00 A.M. or 9.00 A.M., police came and recorded his statement. He has further deposed that after taking Mansukh to the Hospital, Mansukh expired and the deadbody was brought to the village during the noon hours. He identified Bhopa - accused before the trial Court.

In the cross-examination, he has deposed that on hearing shout, they rushed from Garbi chowk of the temple. He has further deposed that at the time when the shouts were raised, about 10-15 persons were present there at Garbi. He has further deposed that he went to Bamanbor Police Chowki. He has further deposed that he was not amongst the persons who lifted Mansukh for taking him in hammock. He has denied a suggestion that Vinu asked him to appear as false witness before the Court. He has deposed that his statement was recorded at 9.00 A.M. in the morning. He has further deposed that when his statement was recorded, Dhama Deva, Premji Sardul, Vira Uka were standing outside the premises at a distance of 10-15 feet.

23. P.W.1 Nathabhai Ramjibhai, Ex.11, who is an eldest brother of Laxman and Mansukh, has deposed in his evidence that his uncle Premjibhai has four sons and out of that four, Bhopa i.e. present appellant (accused) is the eldest son. He has identified the accused before the trial Court. He has deposed that in company of Bhopa, Lila had gone to visit fair of Tarnetar and at that time, Bhopa had threatened Laxman. He has further deposed that Bhopa had illicit relation with Lila w/o. Laxman, since last eight years. He has further deposed that one month before the incident, Bhopa had threatened Laxman and after returning to the house, Laxman told Mansukh about threats given to him by Bhopa. He has further deposed that for that, the complaint had been lodged in the police. He has further deposed that as Laxman told Mansukh about the threats given to him, Mansukh got excited and quarreled with Bhopa and Bhopa was beaten and the case with regard to that incident was still pending on the date of the present incident. He has further deposed that Mansukh was sleeping in chora of Thakar Temple and beside him Vira Uka and Rama Deva were also sleeping in chora. He has also deposed that they were Navaratri days and the day of the incident was 8th day of Navaratri. He has further deposed that at about 11.00 P.M. his uncle Sama Sura had come to him and informed him about the incident. He has further deposed that thereafter, he, his brothers Laxman and Vinu, came to chora, where they saw Mansukh lying in groaning

condition, in the chora. He has further deposed that at that time, there were two wounds, one near umbilicus and another on the left side of the chest on Mansukh and that Mansukh was in bleeding condition, but he was some what alive. He has further deposed that Premjibhai took handkerchief from one Sadhu and with the help of Dhama Deva, they tied bandage on abdomen of Mansukh. He has further deposed that Mansukh was taken to the residence and, thereafter, by calling a matador of Ratna Guga, Mansukh was shifted to the Rajkot Civil Hospital. He has further deposed that after examining Mansukh, doctor declared that he was dead. He has further deposed that for this incident, he lodged a complaint in Rajkot Hospital itself. P.W.1 Nathabhai has given some evidence in question and answer form. That questions and answers were in following nature.

Q. Did you state in your complaint as to who inflicted the knife blows to Mansukh and how ?

A. I stated the name of Bhopa Premji as assailant.

Q. How did you state the names of eye witnesses ?

A. I stated the names of Vira Uka, Rama Deva and Ghogha Ramji, as eye witnesses.

He has further deposed that he had stated the names of persons who were present in chora of the temple. He has proved his complaint Ex.12.

In the cross-examination, he has admitted that he was not present, when the incident took place, but he came to know when he was called by the persons. He has further deposed that he had seen no one injuring or running away from the place. He has further deposed that the population of his village is 800 to 900 persons. He has further deposed that since four years before the incident, Bhopa had illicit relation with Lila and before one year, Lila was sent to her parental home. He has further deposed that Bhopa was not beaten in the fair of Tarnetar, but he was beaten in the village by Mansukh with iron rod. He has further deposed that at that time, Laxman was not present, but his name was given. He has stated in his evidence that the whole village was against Lila and Bhopa. He has further deposed that Premjibhai was a Sarpanch of their village and that except Premjibhai, no other eye witness had come to Rajkot. He has further deposed that their village is at a distance of 1/2 k.m.. from Bamanbor. He has further deposed in para-8 of his deposition that he lodged a complaint at

about 6.00 A.M. after Jamadar of Chotila held inquest of deadbody. He has explained a delay, by stating that the postmortem room was locked during the period between 2.00 A.M. and 6.00 P.M. and the deadbody was lying open in the Hospital and, there was no other person except him beside the deadbody and, therefore, the complaint was not given. He has also explained that when panchnama of deadbody was drawn, he had asked the police officer to take down his complaint, but he was waiting for a call from the police officer and when he was called, he lodged a complaint. He has deposed in para-9 of his deposition that whenever there was failure of supply of electricity in the village, as a Sarpanch, he was managing the affairs for restoration of electricity supply. He has further deposed that Diyo (D.P.) is at a distance of about 300 to 400 meters. He has further deposed that when he returned to chora, the light was on and there was a light of electricity. He has further deposed that when Mansukh was being taken to his residence, their clothes were not stained with blood. This witness has further volunteered before the Court that they have taken Mansukh in hammock of bed-sheet and that bed-sheet was stained with blood. He has further deposed that the house of Bhopa is at a distance of 60-70 meters from the chora. He has further deposed that half an our after 11.00 P.M., they left Rajkot and they reached Rajkot within one hour. He has denied a suggestion which was put to him that they all brothers were trying to kill Bhopa. He has also deposed that after incident, Lila had returned to her in-laws' house and at present, she was residing with them. He has proved his complaint Ex.12.

24. Thus considering the aforesaid evidence of four witnesses, one witness was an eye witness to an actual incident of inflicting knife blows to Mansukh, by present appellant and three witnesses had witnessed the incident of the present appellant going away from the place with a knife. While appreciating the evidence of this type of witnesses giving direct evidence to the incident, certain principles with regard to appreciation of evidence are kept in mind by us. In the case of GANESH K. GUKVE Vs. STATE OF MAHARASHTRA, reported in (2002) 7 S.C.C. 71, the Hon'ble Supreme Court has laid down certain principles with regard to appreciation of evidence, in para-14 as follows :-

"In order to appreciate the evidence, the court is required to bear in mind the setup and the environment in which the crime is committed. The level of understanding of the witnesses. The

overzealousness of some of the near relations to ensure that everyone even remotely connected with the crime be also convicted. Everyone's different way of narration of the same facts. These are only illustrative instances. Bearing in mind these broad principles, the evidence is required to be appreciated to find out what part out of the evidence represents the true and correct state of affairs. It is for the courts to separate the grain from the chaff."

25. In the case of RAMA NAND AND OTHERS Vs. THE STATE OF HIMACHAL PRADESH, reported in 1981 (1) S.C.J. 325,the Hon'ble Supreme Court has observed as follows :-

"..... Perfect proof is seldom to be had in this imperfect world and absolute certainty is a myth. That is why under section 3, Evidence Act a fact is said to be "proved", if the Court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

26. In the case of SARDUL SINGH Vs. STATE OF HARYANA, reported in (2002) 8 S.C.C. 372, the Hon'ble Supreme Court has held as follows :-

"There cannot be a prosecution case with a cast-iron perfection in all respects and it is obligatory for the courts to analyse, sift and assess the evidence on record, with particular reference to its trustworthiness and truthfulness, by a process of dispassionate judicial scrutiny adopting an objective and reasonable appreciation of the same, without being obsessed by an air of total suspicion of the case of the prosecution....."

27. It is also a principle of law that the human mind is an imperfect instrument which, in attempting to grasp facts, unconsciously twists and turns them often. When the witnesses to the case are rustics their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape

is replayed on the mental screen. It so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on. Different persons react differently in different situations and circumstances. No hard and fast rule of universal application with regard to the reaction of a person in a given circumstance can be laid down. Most often, when a person happens to see or come across a gruesome and cruel act being perpetrated within his sight then there is a possibility that he may lose his equilibrium and balance of mind and therefore he may remain as a silent spectator till he is able to reconcile himself and then react in his own way. There may be a person who may react by shouting for help while others may even choose to quietly slip away from the place of occurrence as if they have seen nothing with a view to avoid their involvement, in any way, with the occurrence. Different witnesses react differently under different situations; whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern, is unproductive and a pendantic exercise.

28. P.W.2 Virabhai, P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai are rustic and illiterate villagers. They hail from a small village of which the population is of about 800 to 900 persons. As per the evidence, the day of 01.10.1995 was falling on 8th day of Navaratri festival. There is no dispute that in front of Thakar Temple in chowk, there was a Garbi surrounding which regional folk dance (Garba) was held. Naturally, the villagers will assemble at the place of Garbi at the night time. According to P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai, they were very much present at Garbi in front of Thakar Temple. As the place of Garbi was in front of Thakar Temple being a public

place, the villagers were also sitting in the chora being part and parcel of premises of the temple at leisure hours. If we read panchnama of the scene of offence, Ex.21, we find that there were two pools of blood at a distance of four feet from the entrance of the temple and from the place surrounding one of that pools of blood, some end portions of bidis and pieces of burnt match sticks were found and, therefore, some of the villagers must have sat in the chora of the temple. It comes in evidence that at about 8.00 P.M. or 8.30 P.M., there was failure of electricity supply, and hence, P.W.4 Premjibhai, who is a Sarpanch of the village had gone to D.P. for restoration of electricity. P.W.1 Nathabhai has deposed that usually Sarpanch is making an arrangement of the electricity light, when there is failure in supply of electricity. P.W.1 Nathabhai has also deposed that the place of D.P. is at a distance of 300 to 400 meters and when he came to chowk, he found that lights were on and there was electricity light. In this background, the evidence of the eye witnesses are required to be appreciated. P.W.2 Virabhai, who actually saw the accused inflicting knife blows on the body of Mansukh, has deposed that on that day, he, Rama Deva and Mansukh were sleeping in the temple. He has deposed that Bhopa Premji (accused) had inflicted knife blow on Mansukh and, thereafter, his (accused's) leg touched with a loose ladder, which was put in vertical condition touching the eastern side wall of temple, as a result of which that loose ladder had fallen down and caused noise and on hearing that noise, he woke up and at that time, he saw that Bhopa was inflicting knife blows to Mansukh. He has then deposed that he raised shouts, as a result of which, persons gathered there. Now this witness is not a relative of the deceased Mansukh. He is a illiterate villager. Looking to his evidence, he is an independent witness. He cannot be said to be an interested witness. Some questions were put to this witness about his presence in the temple and he replied that on that day he had gone to Wadi for sleeping purpose, but as it was raining, he came back and was sleeping in the temple. He has denied a suggestion that he was not present there at the place of incident. On reading the entire evidence of this witness, we find that he has given his evidence in most natural and straight forward manner. He has also deposed that Bhopa was a boy of their village and, therefore, he was knowing him and, therefore, there is no question of mis-identity of the assailant. He has no reason to depose against the accused. He has no reason for giving the evidence in favour of the prosecution. We find that his evidence is trustworthy, reliable and dependable.

Mr.D.D.Vyas has argued that his conduct is unnatural because the witness did not go to the house of Mansukh, when Mansukh was shifted to his house. He has further argued that Rama Deva, who was sleeping in the premises of the temple also woke up, on hearing the shouts, but he did not tell about the incident to Rama Deva. This witness had shown the place of the scene of an offence, when the police came to him on the next day. Mr.Vyas has argued that there was no supply of electricity and hence, there was no light to identify the assailant, but from the evidence of P.W.1 Nathabhai, it clearly appears that there was a failure of electricity at about 8.00 P.M. or 8.30 P.M. and there was a darkness. As it was a practice, Sarpanch went to see D.P., which was at a distance of 300 to 400 meters from the place. As per the evidence of P.W.1 Nathabhai, when he came back to chowk, the lights were on, and there was sufficient electric light. In view of this, the presence of this witness is not doubtful at the place and he had an opportunity to see the accused inflicting the knife blows to the Mansukh and, therefore, we do not hesitate to place reliance on this witness P.W.2 Virabhai. His evidence is natural, cogent and convincing. His evidence is trustworthy and it inspires confidence and, therefore, the learned Judge of the trial Court has rightly placed reliance on the evidence of this witness. For P.W.2 Virabhai, Mr.Vyas has argued that looking to his evidence, he was hard of hearing and, therefore, it would be risky to rely on his words that on hearing the noise of fall of loose ladder, he woke up and saw that accused was inflicting knife blows to Mansukh. It be noted that the incident took place on 01.10.1995. The evidence of P.W.2 Virabhai was recorded on 19.07.1997 i.e. practically after about 1 3/4 years. This witness has deposed that he had problem of hard of hearing since one year and before that he was able to hear properly. Under the circumstances, the arguments of Mr.Vyas cannot be accepted.

29. Likewise, P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai are not relatives of the deceased Mansukh. They are rustic villagers. As per their evidence, on hearing the shouts, their attention, was immediately, drawn to the place from where the shouts were coming and at that time, they saw the present appellant by taking with him a knife getting down from the steps of the temple. Here in this case, the prosecution has produced a map of the scene of offence at Ex.22. We find that in front of the temple towards north, there is a Garbi chowk and at the northern end of

the temple, there are steps and, therefore, when these three persons, who were present in the Garbi chowk, they saw Bhopa getting down from the steps with a knife, is a natural say. We do not find their presence to be doubtful. P.W.3 Ghogabhai has deposed that he was knowing Bhopa. P.W.4 Premjibhai has also deposed that he had seen Bhopa and when he was about to go to the temple, Bhopa met him from the opposite direction. These all three witnesses have deposed that when they saw the accused getting down from the steps of the temple, they immediately went inside the temple and saw that Mansukh was lying in an injured and bleeding condition. If we give cumulative effect to this evidence, read with evidence of P.W.3 Ghoghabhai, it is crystal clear that nobody else, but the appellant alone inflicted blows to Mansukh and caused serious bodily injuries to Mansukh, which were ultimately fatal and Mansukh died.

30. Mr.Vyas has brought to the notice of certain omissions and contradictions from the evidence of the aforesaid four witnesses. The said omissions and contradictions are trivial and are of minor nature. They do not affect at the root of the case. The substratum of the prosecution case has remained unshaken. Whatever omissions and contradictions are brought on recorded by defence lawyer were mostly pertaining to motive part. As discussed earlier, when there is no dispute with regard to facts touching motive part, these omissions and contradictions are of a little significance and, therefore, they are not taken into consideration, while evaluating the evidence of the aforesaid four witnesses.

31. The prosecution has placed reliance on a discovery panchnama of knife, produced at Ex.56. It is the case of the prosecution that immediately after arrest of accused, under panchnama Ex.55 at 11.00 A.M. on 06.10.1995, the accused had shown his willingness to show and trace out the muddamal knife concealed by him. For this, a preliminary panchnama was drawn in presence of two panch witnesses, during the period between 12.15 hours and 12.30 hours on 06.10.1995 and, thereafter, the accused took P.S.I. and two panch witnesses to his house and, thereafter, he took them to one varanda which was surrounding the said house of the accused and from the place adjacent to eastern side wall of that varanda, accused traced out a muddamal article, which was found from the place beneath one stone and that muddamal article was attached and seized by P.S.I. in presence of panch witnesses. For all these formalities, panchnama Ex.56 was drawn. To prove this panchnama Ex.56, the prosecution examined P.W.8 Ramesh Somabhai Ex.25 and

P.W.9 Dhirubhai Mohanbhai Ex.26. Both the panch witnesses had turned hostile and they did not support the case of the prosecution. Therefore, the prosecution has proved this panchnama Ex.56 in the deposition of P.W.19 P.S.I. Surjibhai Thavaraji Kharadi (Ex.54). He has deposed that as there was sufficient evidence against the accused, he arrested him (accused) on 06.10.1995 and, thereafter, as accused had voluntarily produced muddamal knife, it was attached and seized under panchnama and, therefore, Mark 10/6 was exhibited at Ex.56. Looking to the evidence of P.S.I. Kharadi, he has not proved the panchnama Ex.56 by deposing necessary facts to prove the ingredients of Section 27 of the Indian Evidence Act. Merely because, the P.S.I. has deposed that the accused had voluntarily produced a muddamal knife, it cannot be said that it is a discovery panchnama under Section 27 of the Indian Evidence Act. What P.S.I. Kharadi has deposed in his evidence with regard to knife is a proof of a recovery panchnama and, therefore, Ex.56 cannot be used against the accused. No doubt, P.W.5 Dr.Rathod was shown this muddamal article No.11 and on seeing that knife, he has deposed that injuries sustained by deceased Mansukh were possible by this knife. Eye witnesses P.W.2 Virabhai, P.W.4 Premjibhai, P.W.3 Ghoghabhai, and P.W.6 Panchabhai were not shown this muddamal article No.11 knife. In view of this evidence, the evidence with regard to alleged discovery panchnama Ex.56 and report of F.S.L. Ex.59 and report of serologist Ex.60, so far they relate to knife cannot be used against the appellant.

32. The prosecution has placed heavy reliance on the statement Ex.46 of the accused, recorded by P.W.15 Dhirajlal, Executive Magistrate of Chotila. As discussed earlier, it is the case of the prosecution and even, it is admitted by the accused himself that before taking place of this incident, he consumed a poisonous drug and, therefore, as admitted by the accused, he had become unconscious. It is the case of the prosecution that first father of the accused immediately took the accused to P.W.11 Dr.Dhanjibhai of village Bedala for treatment. Dr.Dhanjibhai has deposed that on 02.10.1995 one patient of village Navagam (Bamanbor) was brought by his father to his dispensary and father of that boy had said that his son had consumed poisonous drug. This doctor has deposed in the cross-examination that when said patient was under the treatment, the police had come and, thereafter, that patient was taken to Chotila Hospital. He did not refer the case by sending any reference note, but the fact remains on record that thereafter, the father of that boy shifted the present accused to P.W.17 Dr.Juneja. She has deposed that on 02.10.1995, she was

serving as a medical officer in Referral Hospital at Chotila and at that time at about 08.00 P.M., the relatives of Bhopa had brought that patient (Bhopa) from Bedala to her Hospital. She has further deposed that the patient was conscious and his blood pressure was normal. She has further deposed that the patient had already taken a preliminary medical treatment at Bedala. She has further deposed that the patient had consumed poisonous drug and treatment was given for that consumption of drug. She has further deposed that thereafter, that patient was shifted to Civil Hospital, Rajkot on 3rd i.e. on 03.10.1995. P.W.17 Dr.Juneja has produced the bunch of case papers at Ex.51. This witness is not cross-examined by the defence lawyer. Mr.Vyas has much argued on the statement Ex.46 that as per the evidence of P.W.17 Dr.Juneja, the patient was brought to the Referral Hospital, Chotila at 8.00 P.M. and, therefore, the evidence with regard to alleged statement Ex.46 recorded by P.W.15 Dhirajlal, Executive Magistrate is falsified because that Ex.46 appears to have been recorded during the period between 18.40 hours and 18.58 hours on 02.10.1995. Mr.Vyas has further argued that if, accused was brought to Referral Hospital, Chotila at 20.00 hours that fact itself belies the case of the prosecution with respect to statement Ex.46 recorded by P.W.15 Dhirajlal, Executive Magistrate. Mr.Vyas has argued that the evidence of P.W.17 Dr.Juneja is a substantive evidence and there is no reason to disbelieve this witness on the point with regard to the accused, who was brought to the Referral Hospital, Chotila at 8.00 P.M. on 02.10.1995. He has argued that the first page of Ex.51 also shows that he was brought to the Referral Hospital, Chotila at 8.00 P.M. on 02.10.1995. The evidence of P.W.17 Dr.Juneja was recorded on 24.11.1997 i.e. two years after treatment having been given to the accused. Naturally, she would depose on the strength of first page of Ex.51. Mr.Abichandani, learned APP for the State has vehemently argued that time of 8.00 P.M. written in the left corner of the first page of Ex.51 appears to have been written by mistake and this can be said on the basis of next pages of Ex.51. First page of Ex.51 is an outdoor case paper, while the rest of the pages of Ex.51 are with regard to indoor case paper. Second page of Ex.51 speaks that Bhopa of village Navagam (Bamanbor) was brought by his mother Gangaben on 02.10.1995 and History was given to the effect that the insecticide drug which is being used for sprinkling in the standing croup of cotton, was consumed by Bhopa. It is also stated that the preliminary treatment was taken by the patient at Bedala. No doubt, on front side of second page of Ex.51 does not indicate the time as to when he was brought to

the Hospital, but in the right top corner as against the column, "entrance", time 12.45 P.M. is shown with date 02.10.1995. This time of 12.45 P.M. also appears to have been written by mistake. On the reverse of second page of Ex.51, different treatments given at the different timings, are stated. As per example, the treatment given at 6.00 P.M., 10.30 P.M. and 2.00 P.M. These three different timings make it clear that the accused was brought to the Referral Hospital, Chotila at any time before 6.00 P.M. because first preliminary treatment was given when he was admitted in the Hospital before 6.00 P.M. Some another treatment was also given to him at 6.00 P.M. and, thereafter, some treatment was also given at 10.30 P.M. Thereafter, treatment was given at 2.00 A.M. This makes it clear that 02.30 A.M. "reflects the time of date 03.10.1995 and previous timings reflect the date 02.10.1995." The third page of Ex.51 indicates that the accused was given treatment at 9.00 A.M. on 03.10.1995 and on reading this bunch of indoor case papers, Ex.51, it is crystal clear that the patient was brought to the Referral Hospital, Chotila at any time before 6.00 P.M. The incident of this case took place at 11.00 P.M. on 01.10.1995. It is the case of the prosecution that the accused had fled from the place. The accused has stated in his written reply Ex.62 that at 8.00 P.M., he consumed poisonous drug and, therefore, this evidence, makes it clear that in the night in between 01.10.1995 and 02.10.1995 after 00.00 hours i.e. on 02.10.1995, the accused was taken to the Hospital of P.W.11 Dr.Dhanjibhai at Bedala. He gave treatment to the accused and later on he referred the case to the Referral Hospital Chotila by taking patient with him to Chotila and, therefore, in the evening, before 6.00 P.M., he was brought to the Referral Hospital, Chotila and treatments were given at the time when he was admitted and, thereafter at 6.00 P.M. and 10.30 P.M. on 02.10.1995. We are satisfied with the arguments of Mr.Abichandani that the time 8.00 P.M. stated by Dr.Juneja was stated by mistake because, she stated that time on the strength of outdoor case paper where time is stated at 8.00 P.M. The confusion created by Mr.Vyas becomes clear if we read different entries in case papers. We are satisfied with the evidence on record that the accused was brought to the Referral Hospital, Chotila some time before 6.00 P.M. and, therefore, the evidence with regard to statement Ex.46 recorded by P.W.15 Dhirajlal, Executive Magistrate is not falsified. The statement Ex.46 was recorded in between 18.40 hours and 18.58 hours on 02.10.1995 in the Referral Hospital, Chotila. To prove this statement Ex.56, P.W.15 Dhirajlal, who was Executive Magistrate of Chotila on 02.10.1995 is examined at Ex.42. He has

deposed that on 02.10.1995 at about 18.35 hours, he received a yadi Ex.43 from Chotila Police Station requesting him to go to the Hospital and record a dying declaration. He has further deposed that within ten minutes, after receipt of yadi Ex.43, he reached Chotila Hospital. He has further deposed that there was one patient in the Hospital and he recorded the statement of that patient as dictated by the patient. He has further deposed that the statement was signed by Bhopa, who was a patient in the Hospital. The prosecution has produced an office copy of the said statement Ex.46. It is an admitted position on the part of the prosecution that the original of dying declaration was missing for which a proceeding was initiated by the District Magistrate, Surendranagar. The prosecution has produced a letter Ex.49 addressed by District Magistrate, Surendranagar to the Additional Public Prosecutor, District Court, Surendranagar. As per this letter Ex.49, original of statement in connection with C.R.No.126/95 of Chotila Police Station recorded by Mamlatdar was not available in the office of Mamlatdar and, therefore, that original of statement Ex.46 is not produced in the case, as it was missing on the date on which P.W.15 Dhirajlal, Executive Magistrate gave his evidence.

We have perused Ex.46, we find that this statement Ex.46 is a carbon copy of the statement Ex.46 of the present accused recorded by the Taluka Executive Magistrate. There appears the signature of the present appellant below Ex.46. It is not his say that Ex.46 does not bear his signature. When the primary evidence is not available because destruction or missing, the secondary evidence is admissible in view of section 63 of the Indian Evidence Act. The statement was recorded by placing a carbon below original and, therefore, the present case falls under Sub-Section (2) of Section 63 of the Indian Evidence Act and hence, it can be said that it is a primary evidence and it can be looked into. On reading statement Ex.46, we find that the statement was recorded in question and answer form. First, name of patient was asked and patient stated his name to be Bhopa. Thereafter, Executive Magistrate gave his introduction to the patient. Thereafter, Executive Magistrate took all precautions to see that no police officer had remained present at the time of recording the statement of that patient. He has mentioned in statement Ex.46 that there was no police employee either near the bed of the patient or in the room in which the patient was lying on bed. Thereafter, the following questions were asked and the accused replied to that questions as follows.

Q. What happened with you and as to why you have come over here ?

A. I have consumed drug because, deceased Mansukh had beaten me twice or thrice and that Mansukh had abused me frequently and threatened me that he would not live nor he would allow to him to live and this was told by Mansukh of and on. Thereafter, Mansukh told him that it was not certain as to who would die or as to who would survive.

Q. What next was told thereafter ?

A. Yes, thereafter I decided and first consumed drug and, then I went to Garbiwala chowk and inflicted knife blow to Mansukh. I do not know whether he is alive or dead.

Q. Thereafter what had happened ?

A. My father Premjibhai took me to Bedala dispensary and, thereafter, police of Chotila brought me here in this Hospital.

Q. Do you want to state anything more ?

A. No,

Immediately below this statement Ex.46, accused signed and opposite to his signature in the right corner. P.w.15 Dhirajlal, signed in his capacity as Taluka Executive Magistrate and put date 02.10.1995 below his signature.

It is true that the accused had consumed an insecticide poisonous drug and as said by him, he was unconscious thereafter. He was, first taken to Bedala Dispensary and, thereafter, he was brought to Chotila Hospital. If his physical condition would have improved to satisfaction of Doctor at Bedala, perhaps Dr.Dhirajlal would not have referred the case to Chotila Hospital and, therefore, there is a reason to believe that the condition of accused was critical and, therefore, he was brought to Chotila Hospital. Looking to different treatments given to the accused in the Chotila Hospital vide indoor case papers, it can safely be said that his condition was not sufficiently good and, therefore, the I.O. thought it fit to get the dying declaration of accused, recorded by taking help of Executive Magistrate,

and till then he was not arrested because he was taking treatment in the Hospital. From the record, it is also proved that Dr.Bhalala of Referral Hospital, Chotila referred the case to Civil Hospital Rajkot. The prosecution has examined P.W.14 Dr.Tank Ex.38. P.W.4 Dr.Tank has deposed that on 03.10.1995, he was on duty as medical officer in Civil Hospital, Rajkot and during his duty hours at about 2.45 P.M., Bhopa was brought to him along with reference note of Chotila Hospital. He has deposed that the accused was discharged from the Civil Hospital on 05.10.1995. Unnecessarily, no person would be admitted in the Hospital. Accused was kept in Rajkot Hospital for two days and, therefore, he was also under medical treatment in Civil Hospital, Rajkot. On taking into consideration, all these evidence together, I.O. thought it fit to get the statement of accused recorded and accordingly, the Executive Magistrate recorded the statement Ex.46 of the accused, of which contents are reproduced hereinabove. Admittedly, the accused survived and, therefore, Ex.46 cannot be said to be a dying declaration under Section 32 of the Indian Evidence Act. Mr.Abichandani has rightly submitted that Ex.46 cannot be said to be a statement recorded under Section 164 of the Cr.P.C. On examining the evidence of the Executive Magistrate together with the statement Ex.46, we are of the view that it is neither a dying declaration nor a statement under the provisions of Sec. 164 Cr.P.C. It is merely an extra judicial confession of the accused. A person can make oral or written extra judicial confession to anybody. Here in this case, the accused made an extra judicial confession to the Executive Magistrate and the Executive Magistrate reduced that confession into writing and, therefore, Ex.46 containts simply extra judicial confession.

33. Mr.D.D.Vyas, learned senior advocate for the appellant has argued that when the Executive Magistrate recorded the statement Ex.46 of the accused in Referral Hospital, Chotila, the accused was already put under the surveillance of police and, therefore, the said statement, though it was recorded by the Executive Magistrate, was recorded before the police and, therefore, the said statement is hit by Sections 25 and 26 of the Indian Evidence Act. He has drawn our attention to the deposition of P.W.11 Dr.Dhanjibhai before whom the accused was brought first by his father to the Dispensary at Bedala. This witness Dr.Dhanjibhai has deposed in his cross-examination that the police had come to the accused, when he was giving medical treatment in his dispensary and, thereafter, the police had taken away the accused for further medical treatment to Chotila

Hospital. P.W.17 Dr.Juneja has deposed that on 02.10.1995, the relatives of Bhopa had brought him to her Hospital and that said patient had already taken primary treatment at Bedala. She has further deposed that the said patient was admitted by her and the medical treatment was given to him as patient had consumed a drug. She has further deposed that, thereafter, the patient was referred to Civil Hospital at Rajkot for which a note is there in the case papers and that note indicates that Dr.Bhalala had referred the case on date 3rd. In her cross-examination, no case has been put by the accused that when he was brought to the Chotila Hospital, he was put under surveillance of police. No case is put in cross-examination of Dr.Juneja that the police had remained present through out during the period during which accused remained in Chotila Hospital. P.W.15 Dhirajlal, Executive Magistrate has denied a suggestion that the police had brought the accused to him. He has further deposed that he was not aware of the fact that the accused was brought by police. He has denied a suggestion that the statement Ex.46 is a got up statement which was prepared subsequently at the instance of police. If we read Ex.46, we find that the Executive Magistrate had taken a proper care and precaution that no police employee or any other person had remained present nearby bed of accused or in the room itself when the statement of the accused was recorded. In view of this evidence, it cannot be said that the said statement Ex.46 was recorded in the presence of police or said statement was recorded when accused was under custody of police. As per the case of the prosecution, the accused was arrested at 11.00 hours on 06.10.1995. Mr.Abichandani has rightly argued that though accused was easily available to the police, he was not arrested by the police because he was under constant and continuous medical treatment, right from 02.10.1995 to 05.10.1995 and the police officer thought it fit with his good faith and bonafides that it was not desirable to arrest the accused at the earliest. From the record, it appears that the accused was under constant police surveillance, but it does not mean that he was in the custody of the police. Under the circumstances, the said statement Ex.46 cannot be said to have been hit by Sections 25 and 26 of the Indian Evidence Act. As discussed earlier, we find that the said statement Ex.46 is an extra judicial confession. Mr.Abichandani has drawn our attention to Section 24 of the Indian Evidence Act. Section 24 of the Indian Evidence Act speaks that "a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having

reference to the charge against the accused person, proceeding from a person in authority....." Under the circumstances, it is the duty of the accused to show that the statement Ex.46 was recorded by person in authority and further that the said statement has been caused by an inducement, threat or promise. No suggestion has been put in evidence of any witness to bring his case under Section 24 of the Indian Evidence Act. As said earlier, the Executive Magistrate is a responsible public officer. He was not interested either in the case of the prosecution or in the defence of the accused. To our mind, he was an independent public officer, who had no reason to record a false statement Ex.46 or to depose falsely against the accused. Under the circumstances, Ex.46 is a most important material documentary evidence which is in form of extra judicial confession of the accused and that statement can be used against him. It lends assurance to the evidence of P.W.2 Virabhai, who is an eye witness to the incident and P.W.3 Ghoghabhai, P.W.4 Premjibhai and P.W.6 Panchabhai. Under the circumstances, the evidence of the aforesaid four important witnesses gets full corroboration from the statement Ex.46 in which the accused has admitted for having inflicted knife blows to Mansukh in Garbiwala chowk after consuming poisonous drug. This statement Ex.46 gets corroboration on material parts of the case of prosecution, from the written reply Ex.62 of the accused himself.

34. In view of the evidence discussed hereinabove, the learned Judge of the trial Court has appreciated the evidence keeping in mind the well settled principles of law with regard to appreciation of the evidence. The learned Judge of the trial Court has, after appreciating the evidence, come to a conclusion that the accused committed a murder of Mansukh, by inflicting knife blows to Mansukh in Garbiwala chowk in front of Thakar Temple in village Navagam (Bamanbor) and for arriving at this conclusion, he has assigned cogent and convincing reasons. We do not find any infirmity in the appreciation of the evidence made by the learned Judge of the trial Court. We are in complete agreement with the reasons assigned by the learned Judge of the trial Court. When the appellate Court, after reappreciating the evidence, comes to a conclusion that it is in full agreement with the reasons assigned by the learned Judge of the trial Court, it is not necessary for it to reiterate the some reasons in its judgment. It is also not necessary to restate the evidence of witnesses in its judgment. Still, however, we have, as discussed hereinabove, restated the evidence of the witnesses and

we have reappreciated the evidence afresh to come to our own conclusion to decide this present appeal.

40. In view of what is stated hereinabove, the judgment of the conviction and sentence, rendered by the learned Judge of the trial Court is manifestly just and proper. There is no reason to interfere with the findings arrived at by the learned Judge of the trial Court. In view of this, this present appeal is devoid of merits and it requires to be dismissed.

41. For the foregoing reasons, this appeal is dismissed. The judgment Ex.64 of the conviction and sentence dated 15.01.1995 rendered by the learned Additional Sessions Judge, Surendranagar in Sessions Case No.4 of 1996 is confirmed. The order regarding disposal of the Muddamal articles as per terms of directions given by the learned Judge of the trial Court in the final operative order of the impugned judgment is maintained.

[H. H. Mehta,J.]

[Sharad D. Dave,J.]

(vijay)